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No. 05-915

In the

Supreme Court of the United States

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a school district's judgment is entitled to deference when it uses a racial classification to assign students to public schools to achieve racial diversity or racial integration.

2. Whether achieving racial balancing is a compelling governmental interest sufficient to permit race-based restrictions on school assignments in public elementary and secondary schools.

3. Whether a student assignment plan that mechanically and inflexibly restricts assignments so that no school has less than 15% or greater than 50% black students meets the narrow tailoring requirements of the Equal Protection Clause.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and the American Civil Rights Institute (ACRI) submit this brief amicus curiae in support of Petitioner Crystal D. Meredith.[1] The parties have lodged universal letters of consent with the Clerk of this Court for the filing of briefs amicus curiae.

For more than 30 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Johnson v. California*, 543 U.S. 499 (2005), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Additionally, PLF has been at the forefront in interpreting and enforcing Proposition 209, the voter initiative that prohibits the state, including school districts, from discriminating against or granting preferences on the basis of race. PLF attorneys were lead counsel in, among others, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 24 Cal. 4th 537 (Cal. 2000) (interpreting Proposition 209); and *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96, 98 Cal. App. 4th 1275 (Cal. Ct. App. 2002) (applying Proposition 209 to a school district's racial balancing plan).

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

CEO and ACRI are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources studying the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici advocate the cessation of racial, ethnic, and gender discrimination by all public and private entities. Amici have participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case, and participated previously as amici curiae in this case supporting the petition for writ of certiorari.

STATEMENT OF THE CASE

After being released from a desegregation order, Jefferson adopted a student integration plan (2001 Plan). The plan divides students into two racial categories—black and white.[2] It then uses race to assign children to elementary and secondary public schools to ensure that no school has a black population of less than 15% or greater than 50% in a system whose overall student population is 34% black. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 840-42 (W.D. Ky. 2004), *aff'd* 416 F.3d 513 (6th Cir. 2005). Jefferson uses its 15-50% racial guidelines to set non-contiguous attendance boundaries, to grouping of elementary schools into clusters, for admissions into special programs including magnet programs, and to handle student transfer requests. *Id.* at 842. Where the racial composition of a school is at either end of the range, race is the ultimate factor in granting or denying a child his or her choice of school if the request places the school outside the racial guidelines, even if the receiving school has space available. *Id.* at 842 (the racial guidelines provide a firm definition of the racial quota to be maintained by "provid[ing]

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[2] Jefferson lumps Latino and Asian students into the white racial group. *McFarland*, 330 F. Supp. 2d at 840 n.6.

administrators with the authority to facilitate, negotiate and collaborate with principals and staff *to maintain* schools within the 15-50% range") (emphasis added). The purpose of the racial guidelines is to facilitate racial balancing by ensuring that each public school will have a predetermined racial mix of black and white students.

When Crystal Meredith sought to transfer her son, Joshua McDonald, from Young to Bloom Elementary School, she was told that the transfer application was denied—not because of his grades or interests or school capacity—but because he is white. He "was denied admittance because his transfer to Bloom would have had an adverse effect on Young's racial composition." *Id.* at 838 n.3. Ms. Meredith filed a lawsuit claiming that the race-based school assignment plan violates the Equal Protection Clause.

In deferring to the locally elected school board, the lower court held that Jefferson has a compelling interest in "maintaining integrated schools." *Id.* at 849-55. Although the district court noted that the "context of an elementary and secondary school student assignment plan" was "slightly different" from the context of *Grutter*, *id.* at 837, it found that the educational benefits flowing from its race-based assignment plan "are precisely those articulated and approved of in *Grutter*." *Id.* at 853.

Then the lower court examined each of the *Grutter* narrow-tailoring factors and upheld the 2001 Plan.[3] Holding that the plan did not constitute an illegal quota, the court then distinguished the school district from a law school, downplaying the need for individualized review since the district's plan did not involve competition and comparative

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[3] The lower court held that the assignment policy at traditional public schools where white and black applicants were put on separate assignment tracks was an illegal quota. *Id.* at 837. This holding is not an issue in this case.

criteria. *Id.* at 860. Considering the undue harm factor of *Grutter*, the court again distinguished the public school setting from higher education, pointing out that "the consequences of assigning students to various public schools are quite different from denying an applicant admission to a selective college or job placement." *Id.* at 860. According to the lower court, Jefferson's public schools are "basically equal" and using race to grant or deny a student's choice of school does not "den[y] anyone a benefit nor impose[] a wrongful burden." *Id.* at 860.

SUMMARY OF ARGUMENT

Striving for a predetermined racial balance to ensure that no public school has a black population of less than 15% or greater than 50%, Jefferson County Board of Education (Jefferson) racially discriminates in assigning children to K-12 public schools. In determining that there was a compelling interest in such discrimination, the court below relied on *Grutter*. But, the *Grutter* rationale for promoting student body viewpoint diversity in institutions of higher education simply has no counterpart in the context of elementary and secondary public schools. The extraordinary deference this Court accorded the judgment of officials of the University of Michigan springs from their unique First Amendment right and is not available to locally elected boards because they are susceptible to politics of all kinds, including racial politics. Both *Croson*, 488 U.S. at 496, and *Wygant*, 476 U.S. at 276, refused to defer to elected local bodies. The Equal Protection Clause cannot take a backseat to the discretion of elected local school boards.

No decision from this Court sanctions discriminatory student assignments to achieve racial balancing in K-12 public schools as a compelling state interest. Racial integration in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. *Grutter*'s acceptance of a genuine diversity

interest has no counterpart in K-12 public schools and should be limited to higher education. Unlike universities where students choose to apply, K-12 students have a right to admission. Public universities have expansive freedoms of speech whereas the education mission of K-12 public education is to teach fundamental values, including the principle of nondiscrimination and the lesson that we not define by skin color.

This Court should not rely on disputed social science research to support a claim that racial balancing is a compelling interest. Social science research frequently rests on uncertain footing. Its use in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), *Grutter*, and *Gratz* has been strongly criticized because such research can be revised or repudiated. Using social science research to support racial discrimination is simply too thin. Its use must be cabined here or there will be no end to the creativity with which such claims are made.

Racial balancing of K-12 public schools also cannot meet the Court's narrow tailoring requirements. Race is the decisive factor here and is used mechanically and in the nonindividualized manner rejected in *Grutter* and *Gratz*. K-12 administrators simply cannot perform the individualized holistic review *Grutter* found paramount in its race-conscious admissions program.

Public school should be required to prove as part of the narrow tailoring inquiry that race neutral alternatives for achieving educational benefits have failed before resorting to racial discrimination. Since the adoption of Proposition 209 ten years ago, California has prohibited the use of race as a factor in the operation of its public schools. As a result of Proposition 209, the University of California has expanded its outreach programs to prepare students from low-income families—regardless of race—for college. Since the adoption of Proposition 209, more students are graduating from high

schools, the dropout rate has improved, and more students are taking classes for admission to the University of California and state universities.

ARGUMENT

I

DEFERENCE TO ELECTED LOCAL SCHOOL BOARDS ON THE USE OF RACE IS INCOMPATIBLE WITH THE EQUAL PROTECTION CLAUSE

In this case, the lower court improperly accorded deference to an elected local school board's policy that uses race in assigning children to K-12 public schools. Because of the importance of local control of public education, the lower court reasoned that elected school boards who formulate and implement educational policies for their communities, including the use of race in assignment policies, are entitled to deference. *McFarland*, 330 F. Supp. 2d at 851 n.32. Deferring to elected local school boards engaged in race-based classification and assignment of students, however, is fundamentally incompatible with this Court's Equal Protection jurisprudence. "The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (the "Fourteenth Amendment . . . protects citizens against the State itself and all of its creatures—Board of Education not excepted").

The Equal Protection Clause mandates that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Because the Fourteenth Amendment 'protects *persons* not *groups*,' all governmental action based on race—a *group* classification long recognized as in most circumstances

irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and citations omitted). *See also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States").

In *Adarand*, this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This Court stated that free people "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because government racial discrimination of any sort is inherently suspect, and so racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216.

> The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid scrutiny" and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Id. (citations omitted). This includes so-called neutral policies that burden or benefit the races equally. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *see also*, *Loving*, 388 U.S. at 8 (rejecting the argument that a miscegenation statute did not discriminate because it "punish[ed] equally both the white and

the Negro participants in an interracial marriage"). Indeed, this Court rejected the notion that separate can ever be equal—or "neutral"—in *Brown*, 347 U.S. at 495, and refused to resurrect it in *Johnson*, 543 U.S. at 500. Therefore, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand*, 515 U.S. at 224.

For race-based educational policies "[t]o withstand our strict scrutiny analysis, respondents must demonstrate that the[ir] use of race in [their] current admission program employs 'narrowly tailored measures that further compelling governmental interests.'" *Gratz*, 539 U.S. at 270. The lower court's deference to local elected officials is antithetical to strict scrutiny's requirement of "the *most searching* judicial inquiry." *Adarand*, 515 U.S. at 235.

Grutter did not overturn this doctrine. In *Grutter*, this Court accorded extraordinary deference to the determination by officials of the University that genuine diversity was essential to its educational mission. *Grutter*, 539 U.S. at 328-29. This deference springs from the University's unique First Amendment interests. 539 U.S. at 329. The "proper institutional mission" is stated in terms of academic discussion grounded on the First Amendment.[4] This First Amendment deference would not be granted to any other government agency. *See, e.g., Johnson*, 543 U.S. at 512 (this Court refused

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[4] This deference to university officials is not open-ended. The dissents in *Grutter* recognized the danger of according deference to university officials when race classifications are used. Justice Kennedy said that according deferential review "is nothing short of perfunctory," when the Court accepts the law school's "assurances that its admissions process meets with constitutional requirements." *Grutter*, 539 U.S. at 388-89 (Kennedy, dissenting). Justice Thomas found this Court's deference to the university to be a total abdication of its duty to strictly scrutinize. *Id.* at 362 (Thomas, J., dissenting).

to accord deference to state prison officials on race "where those officials traditionally exercise substantial discretion"). The law school's First Amendment right is not part of the education mission of K-12 public schools. Instead, K-12 education is inculcation, not exposure. Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003).

Further, elected school boards, like elected city councils, are not insulated from the temptation of "racial politics." "Racial politics" is not only helping one's own race, it uses race to curry votes. Tom Campbell, *Separation of Powers in Practice* 122 (2004). In *Croson*, this Court invalidated an elected local city council's voluntary race-based preference program fearing that it was adopted for the purpose of "racial politics"—a concept that applies equally to local school boards. This Court demanded that any government entity seeking to classify by race must point to specific identified instances of past or present discrimination.

> [I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Croson, 488 U.S. at 510-11. Race-based decisions made by political groups in the political process are suspect. *Id.* at 496. This Court held:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications

> are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493. Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens."

Id. at 521 (Scalia, J., concurring in judgment) (citations omitted).

The circumstances under which racially discriminatory local legislation or programs may legally be enacted are extremely narrow. The enactment of racially discriminatory programs merely as a part of the political process to better the condition of one racial group is not permitted under the Constitution. *Croson*, 488 U.S. at 495-96. At best, racial integration of public schools is likely nothing less than a local school board's attempt to remedy general societal discrimination, an interest that has been rejected by this Court.

The lower court's deference to Jefferson's elected school board is contrary to *Wygant*, 476 U.S. 267. In *Wygant*, this Court did not defer to a local school board's judgment with respect to the purported benefits of a racially mixed teaching staff. There, this Court found unconstitutional a collective-bargaining agreement between a school board and a teacher's union that favored certain minority races. The school board defended the agreement on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students. 476 U.S. at 275-76. This Court held that the use of race violated the Equal Protection Clause and rejected an asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination." *Id.* at 274. That interest was found to be "too amorphous a basis for imposing a racia[l] classifi[cation]." *Id.* at 276. The *Wygant* decision and many others will have to be revisited if the school district's "social science" is deferred to here.

Similarly, this Court should not defer to Jefferson's elected school board with respect to an educational policy that uses race to discriminate against students in assigning them to public schools. Jefferson's purported interest in using race is neither remedial nor necessary to prevent imminent danger of life and limb. It is not only open-ended, it is also entirely free-floating because it is not tied to any showing of actual racial discrimination and has no logical stopping point. The lower court's reference to *Brown*, 347 U.S. at 836-37, is of no assistance. Indeed, in *Wessmann v. Gittens*, 160 F.3d 790, 797 (1st Cir. 1998), the First Circuit explicitly rejected the argument that courts should "defer[] to school officials' determinations anent the racial and ethnic composition of the student body." The *Wessmann* court said that "the School Committee's citation to *Brown* is self-defeating, for the *Brown* Court made it abundantly clear that constitutional principles cannot take a

backseat to the discretion of local school officials in respect to matters such as the racial composition of student bodies." *Id.* at 797 n.3.

Deference to an elected local body is inconsistent with the holdings of this Court in *Grutter*, *Adarand*, *Croson*, and *Wygant*. Because Jefferson is an elected political body, it may "be greatly tempted to use race for political advantage if permitted to do so." Campbell, *supra*, at 125. Any watering down of equal protection review will effectively assure that race will always be relevant in American life, and that the " 'ultimate' goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson*, 488 U.S. at 495 (citations omitted).

II

RACIAL BALANCING IS NOT A COMPELLING INTEREST SUFFICIENT TO JUSTIFY DISCRIMINATING AGAINST STUDENTS IN K-12 PUBLIC SCHOOLS

A. *Grutter* Does Not Countenance Racial Discrimination in K-12 Public Schools

Jefferson discriminates against students in assigning them to its elementary and secondary public schools. A student will be denied a transfer to a school of his or her choice, or assignment to a special program or magnet program, if the student's assignment will impact Jefferson's goal "to achieve a racial mix of between 15% and 50% black students at each school." *McFarland*, 330 F. Supp. 2d at 857. According to Jefferson, this discrimination against children is to ensure a predetermined racial mix of black and white students in order "[t]o give all students the benefits of an education in a racially integrated school." *Id.* at 850 n.29. The lower court changed the rationale in *Grutter* in an attempt to justify the use of race.

The lower court held that the "benefits that the board seeks from an integrated school system are precisely those articulated and approved of in *Grutter*." *Id.* at 853.

Grutter's rationale cannot be changed to justify discrimination against children for the purpose of racially integrating public schools. As this Court emphasized in *Grutter*, "[c]ontext matters when reviewing such [race-based] action." *Grutter*, 539 U.S. at 308.

First, this Court granted *certiorari* in *Grutter* to resolve "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public *universities*." *Grutter*, 539 U.S. at 322 (emphasis added).[5] *Accord*, *Gratz*, 123 S. Ct. at 2422. The Court held that student body "diversity" of the kind approved by Justice Powell in *Bakke*, 438 U.S. 265, could be a compelling interest for state universities and graduate schools.[6] *Grutter* did not address whether racial diversity can be a compelling interest that justifies the use of race in K-12.

Second, context is crucial. *Grutter*'s compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the university environment . . . a special niche in our constitutional tradition." *Grutter*, 503 U.S. at 329; *accord Bakke*, 438 U.S. at 312 (Powell, J., opinion) (a

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[5] To emphasize that context is limited to public *universities*, this Court noted: "Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that it is)." *Grutter*, 539 U.S. at 322.

[6] In *Bakke*, Powell recognized a university's right to "select those students who will contribute the most to the 'robust exchange of ideas,'" a goal of "paramount importance in the fulfillment of [the University's] mission." 438 U.S. at 313.

university's First Amendment right to "[a]cademic freedom," includes "[t]he freedom of a university to make its own judgments as to education" and "the selection of its student body").

Grutter's compelling state interest analysis simply has no counterpart in K-12 public schools. First, students in elementary and secondary schools have a right to admission. *Goss v. Lopez*, 419 U.S. at 574. Second, the educational mission of K-12 public schools is different from that of universities. The purpose of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). K-12 public schools prepare students for citizenship, which includes teaching the principles of our Constitution. *Bethel*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003).[7]

At bottom, Jefferson's 2001 Plan is simply a mechanism for racial balancing where the school district demands nothing more than proportional representation by pigmentation to achieve the school district's preferred racial mix of black and white students.

B. Racial Balancing To Promote Racial Integration in K-12 Public Schools Offends the Equal Protection Clause

The lower court held that the 2001 Plan's use of race to promote racial integration does not violate the Equal Protection

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[7] *Available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Oct. 4, 2005).

Clause. *McFarland*, 330 F. Supp. 2d at 855. Under the 2001 Plan, race is the ultimate factor in approving or denying a transfer request or assignment to a special program. Under the 2001 Plan, a child classified as "white" may not receive a transfer, even if the receiving school has capacity, if the school the child wishes to transfer from does not have "enough" white students. In contrast, a child classified as "black" may not receive a transfer if the school that child wishes to transfer into has "too many . . . black children." *See* 330 F. Supp 2d at 838 n.3 ("[Joshua] was denied admittance because his transfer to Bloom would have had an adverse effect on Young's racial composition"). The purpose of the discrimination is to ensure that no school has a black student body of less than 15% or greater than 50%. *Id.* at 840-42. *Grutter* rejected racial balancing as a compelling interest, stating that "[e]nrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin" (539 U.S. at 308) would "amount to outright racial balancing, which is patently unconstitutional." *Id.* at 329-30 (citations omitted).

Jefferson's attempt to describe its program in terms of racial range rather than a single racial percentage does not immunize the Plan from the prohibited practice of racially balancing its student body. Jefferson admits that if a "school exceeds its capacity or hovers at the extreme ends of the racial guidelines," an application will be denied. 330 F. Supp. 2d at 844. "At a certain point in its application process . . . the [Plan] relies on race and ethnicity, and nothing else, to select a subset of entrants." *Wessman*, 160 F.3d at 794. Unlike genuine diversity in higher education, diversity measured by race alone does not provide any demonstrable education benefit in the public school setting and does not constitute an interest compelling enough to justify the use of a racial classification that is used to discriminate against children. Relatively few school systems use race-based assignments, yet they teach their

children well; indeed, Jefferson could not claim that education is impossible without discrimination—just that it is improved by some nebulous degree.

Further, the 2001 Plan's goal of achieving "racial integration" through racial balancing has no support under the federal Constitution. While there can be no question the Constitution prohibits a school district from acting to segregate students, there is no federal constitutional mandate to implement a proactive program of balancing that also uses race to discriminate against children. This Court has made it clear that such a plan is *not required* by the federal Equal Protection Clause.

The 2001 Plan does not pursue diversity of socioeconomic class, life experience, or talents. Instead Jefferson seeks diversity measured by race alone. Under the 2001 Plan, children are granted or denied their transfer requests to their preferred public schools according to a mechanical, arithmetic formula. The only purpose of these racial percentages is to move the racial composition of the schools affected closer to a predetermined racial balance. It provides "administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range." *McFarland*, 330 F. Supp. 2d at 842. And it is just this process of racial balancing—the mechanical use of race to accomplish a predetermined racial balance—that this Court has condemned beginning with *Bakke* through *Grutter* and *Gratz*.

C. There Should Be No "Social Science" Exception to the Equal Protection Clause

In this case, Jefferson proffered social science evidence to buttress its claim that racial integration is a compelling interest. *Id.* at 852. The use of social science evidence to support the development of the law has been highly criticized because it is value laden and litigation driven. For example, although there was universal approval of *Brown*'s desegregation mandate, this

Court's reliance on psychological findings to supports its ruling was immediately attacked because psychological findings can be revised or repudiated.

> Today the social psychologists . . . are liberal and egalitarian in [their] basic approach. Suppose a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racist notions and label them "science." What then would be the state of our constitutional rights?

Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 167 (1955); Angelo N. Ancheta, *Civil Rights, Education Research, and the Courts*, Educational Researcher, Jan.-Feb. 2006 at 26.

Professor Ancheta recognizes that social science evidence rests on an uncertain footing in civil rights and other forms of litigation for a number of reasons. *See*, Ancheta at 27. First, "law and science operate through highly dissimilar institutions and processes, with significantly different vocabularies, methodologies, and cultures that do not readily lead to clear paths for judges, litigators, or expert witnesses to follow." *Id.* at 27.[8] Second, courts lack the expertise necessary to interpret social science evidence or statistical methods. This lack of knowledge may cause courts to avoid deeper inquiries on important debates about scientific knowledge. *Id.* And third, the screening of social science research is virtually nonexistent,

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[8] Ancheta identified numerous core differences including, among others, "legal reasoning is largely deductive, while scientific method is largely inductive; legal findings are often based on certainties and standards such as proof beyond a reasonable doubt, while scientific findings are typically based on probabilities and levels of confidence." *Id.* at 27.

and so "weak or bad science" has been used to formulate public policy and create broad legal principles. *Id.*[9]

The lack of reliability of social science evidence is often critiqued by dissenting judges. In *Grutter*, Justice Thomas cited conflicting research suggesting that greater racial diversity on college campuses actually "hinders students' perception of academic quality." 539 U.S. at 364 (Thomas, J., dissenting). Justice Thomas goes on to criticize the majority for ignoring research on students at historically black colleges and universities that indicated that racial heterogeneity could impair learning among black students. *Id.* Likewise, Justice Scalia criticized the scientific research on diversity stating that cross-racial understanding "is not, of course, an 'educational benefit' on which students will be graded on their law school transcript." *Id.* at 347 (Scalia, J., dissenting).

In this case, the court below relied on Jefferson's social science evidence proffered by Dr. Gary Orfield to support its opinion that "racial integration" provides a benefit in public schools. *McFarland*, 330 F. Supp. 2d at 839 n.5. Yet, Dr. Orfield's social science research on voluntary desegregation plans has been strongly criticized. *See, e.g.*, Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O'Neill and Possible Remedies for Racial Isolation*, 29 Conn. L. Rev. 1187, 1214 (1997) (criticizing Dr. Orfield's conclusion

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[9] The social science evidence presented by the University of Michigan in *Gratz v. Bollinger* has been strongly criticized for its "research design and method measurement, sampling, statistics, and statistical interpretation." Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger* 4, *available at* http://www. ceousa.org/recent.html (last visited June 30, 2006); Drs. Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education* 79 (2001) (finding that the data base used by Patricia Gurin "disconfirms" the claim that racial and ethnic diversity in school benefits students) *available at* http://www.nas.org/reports/sup_ct_mich/sup_ct_mich_ launch.htm (last visited June 30, 2006).

that school districts with voluntary desegregation plans had virtually no increase in white enrollment loss. Dr. Rossell found that school districts that either dismantled their plans or had no plan actually had less "white flight." Likewise, Abigail Thernstrom & Stephan Thernstrom, *No Excuses, Closing the Racial Gap in Learning* 170-79 (2004) criticized Dr. Orfield's findings that attending a school in which minorities are in the majority has terrible educational and social consequences because they are exposed to too few whites).

This Court should not create a social science exception to the Equal Protection Clause. The racial integration rationale is simply too thin to justify government action that discriminates against a child's skin color. If the use of social science evidence is not cabined here, there will be one dubious social-science-supported claim of compelling interest after another. There are few government programs that cannot be tied in some way to an interest that is arguably "compelling," and there will always be a social scientist who can show a connection between achieving the interest and some "benign" use of race. Indeed, this case shows that there is unlikely to be an end to the creativity with which such claims are made. "It is no coincidence that both the science of race and the law on race have reflected underlying societal values, whether it has been scientific racism and the upholding of slavery in the 19th century; social Darwinism, eugenics, and the maintenance of Jim Crow segregation in the early 20th century; or the growth of egalitarianism in science and law in the 1940s and 1950s." Ancheta, *supra*, at 29 (citation omitted). Nondiscrimination cannot be taught by discrimination—assigning students by skin color feeds stereotyping and the notion that we are defined by race.

III

RACIAL BALANCING OF K-12 PUBLIC SCHOOLS CANNOT MEET THE NARROW TAILORING REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE

A. Jefferson's Racial Balancing Plan Fails To Provide Individual, Holistic Review of Students

When racial balancing becomes a permissible government objective, few of the narrow tailoring requirements of strict scrutiny apply in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which students can contribute to diversity. Race becomes the decisive factor and is used in the mechanical, non-individualized manner rejected in *Grutter*. 539 U.S. at 337 ("[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount"). When race is not the means to an end but the end itself, we have "discrimination for its own sake," *Bakke*, 438 U.S. at 307, and there is no compelling interest.

Picking and choosing from *Grutter's* hallmarks of narrow tailoring, the lower court found that Jefferson's use of race in assigning students to elementary and secondary public schools "actually operates like the 'plus' system" approved in *Grutter*. *McFarland*, 330 F. Supp. 2d at 859. Yet, the contrast could not be sharper.

In *Grutter*, this Court found that the law school admissions program

> engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment . . . . [T]he Law

> School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single "soft" variable.

Grutter, 539 U.S. at 337. The law school program "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* The program "adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions" and does not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Id.* at 337-38. The law school "seriously considers each 'applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.'" *Id.* at 338. Further, the law school plan "gives substantial weight to diversity factors besides race." *Id.* In sum, the law school plan

> seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.

Id. at 338-39.

In this case, the 2001 Plan operates as a quota to achieve and maintain a predetermined ratio of white to black students in the public schools. Its sole function is to prevent any school from deviating by more than a preset number of percentage points from the district's preferred 15/50 ratio of white to black students. *McFarland*, 330 F. Supp. 2d at 842.

Although Jefferson offers students choices of numerous and varied school programs, it withholds choice whenever

> the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected. In a specific case, a student's race, whether black or white, could determine whether that student receives his or her first, second, third or fourth choice of school.
>
> For the most part, the guidelines provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range.

Id. at 842.

Race becomes the ultimate factor. As the First Circuit recognized in *Wessmann*, 160 F.3d at 799, "[t]he [Plan] is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden." In *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), the Fourth Circuit addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. In finding that the use of race was not narrowly tailored, the appeals court found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing . . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping

> certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The 2001 Plan provides none of the individualized considerations essential to the Court's approval of the use of race by the Michigan Law School. Jefferson has not demonstrated how it gives each K-12 student "a highly individualized, holistic review" when its purpose is simply to ensure that each school has no less than 15% black students and no more than 50%.

> It is challenging enough to determine what elements of "diversity" a young adult, who has had time to gain some modicum of life experience, might bring to a law school class. It would be absurd to presume the ability to make such a determination for students in the public K-12 setting. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest [which] encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

J. Kevin Jenkins, *Grutter, Diversity, and Public K-12 Schools*, 182 Educ. Law. Rep. 353, 368 (2004).

The 2001 Plan demands nothing more than proportional representation by pigmentation to achieve the school district's preferred racial mix of students. This racial balancing is constitutionally forbidden. *Gratz*, *Grutter*, and *Bakke* lead to the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

B. School Districts Remain Free To Address Racially Imbalanced Schools Through Race-Neutral Means

The school board asserts that racially balanced schools are essential to reassure the community that all children will be given equal educational opportunities. *McFarland*, 330 F. Supp. 2d at 836. Surely transparency of each school's budget, its faculty's qualifications, its curricula, and so forth is an equally effective way to supply the community this reassurance. Parents want to know that their children are not being short changed in favor of anyone, not just short-changed on the basis of race. A parent whose child attends an underfunded school will not be mollified by being told that the school is racially identical to an overfunded school.

At a minimum, school districts should be required to prove that race-neutral alternatives have failed before resorting to a race-based plan. Using race is personally unfair, it sets a disturbing legal, political, and moral precedent in favor of government discrimination, it creates resentment and teaches that racial identity is more important then individual rights. These interest costs make the use of race less compelling, they also make it essential to find other means to achieve the ends of education. Instead, school districts should ensure broad educational opportunities to all students without regard to irrelevant characteristics such as race.

> Perhaps in lieu of spending time and money on racial balancing schemes, public school officials could better use the resources trusted to their care by focusing on the problems that currently exist in many schools serving disadvantaged students. Addressing deficiencies in neighborhood schools would allow interested students the opportunity to prepare for higher education and to compete for admission on

> equal footing, without the accompanying stigma and resentment associated with racial preferences.

Jenkins, *supra*, at 369-70.

Moreover, there is nothing prohibiting school districts from addressing racially imbalanced schools through genuine race-neutral means. The United States Department of Education, Office of Civil Rights, identifies numerous "innovative 'race-neutral' alternatives to encourage diversity 'to ensure that their student bodies are accessible to people from a wide variety of backgrounds.' " United States Department of Education, Office of Civil Rights, *Achieving Diversity: Race-Neutral Alternatives in American Education*, Feb. 2004.[10] Examples include:

- Providing preferences on the basis of socioeconomic status. These plans seek to reduce concentrations of poverty and "set the tone that academic achievement is to be valued and that aspirations should be set high." *Id.* at 34.

- Creating many new "skills development" programs—projects designed to improve educational achievement among students who attend traditionally low-performing schools. *Id.*

- Low-performing schools entering into partnership with universities to strengthen their students' ability to succeed in college.

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[10] *Available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (last visited July 9, 2006).

C. California's Proposition 209 Provides All K-12 Public School Students Equal Education Opportunities Without Using Race-Based Assignment Plans

For the last ten years, California school districts have been providing equal educational opportunities to all its K-12 public school students without using race-based assignment plans. In 1996, the voters overwhelmingly approved Proposition 209, adding Article I, Section 31, to the California Constitution. The operative provision provides:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a). "State" includes school districts. Cal. Const. art. I, § 31(f).

In adopting Proposition 209, the voters made it clear that section 31 does not permit the use of race for any reason whatsoever:[11]

> Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no

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[11] The Ninth Circuit Court of Appeals in *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997), held that Proposition 209 did not violate the Equal Protection Clause. "That the [federal] Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification." *Id.* at 708.

> "compelling state interest" exception; we find nothing to suggest the voters intended to include one sub silentio.

Hi-Voltage, 12 P.3d at 1087, 24 Cal. 4th at 567.

One of the goals of Proposition 209 was to "address inequality of opportunity . . . by making sure that *all* California children are provided with the tools to compete in our society." 12 P.3d at 1083, 24 Cal. 4th at 561. The voters also recognized that adopting Proposition 209 would "eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts." *Id.* at 584 (concurring and dissenting opinion of George, C.J.). The Legislative Analyst estimated "that up to $60 million of state and local funds spent each year on voluntary desegregation programs may be affected." *Hi-Voltage*, appendix. Those funds would be spent on other public school programs. 24 Cal. 4th at 600-01.

Since the passage of Proposition 209, California has used race-neutral methods to pursue the goal of providing opportunity for all California's children. For example, the UC Links program at the University of California Berkeley prepares K-12 students from low-income families for college.

> UC Links is a network of educational programs that connect community and university partners to provide computer-based and other learning activities for school children. UC Berkeley has seven UC Links sites, where UCB students and K-12 youth, working in small groups, learn together . . . designed to promote literacy, science, and computer skills, as well as collaborative behavior.[12]

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[12] *Available at* http://students.berkeley.edu/outreach//Programs.asp?rid=52 (last visited June 23, 2006).

These and other outreach programs have provided positive results without considering the race of the student. "The graduation rates of California's high school students steadily increased after the passage of Proposition 209" in every ethnic group. Eryn Hadley, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. Pub. L. 103, 132 (2005).

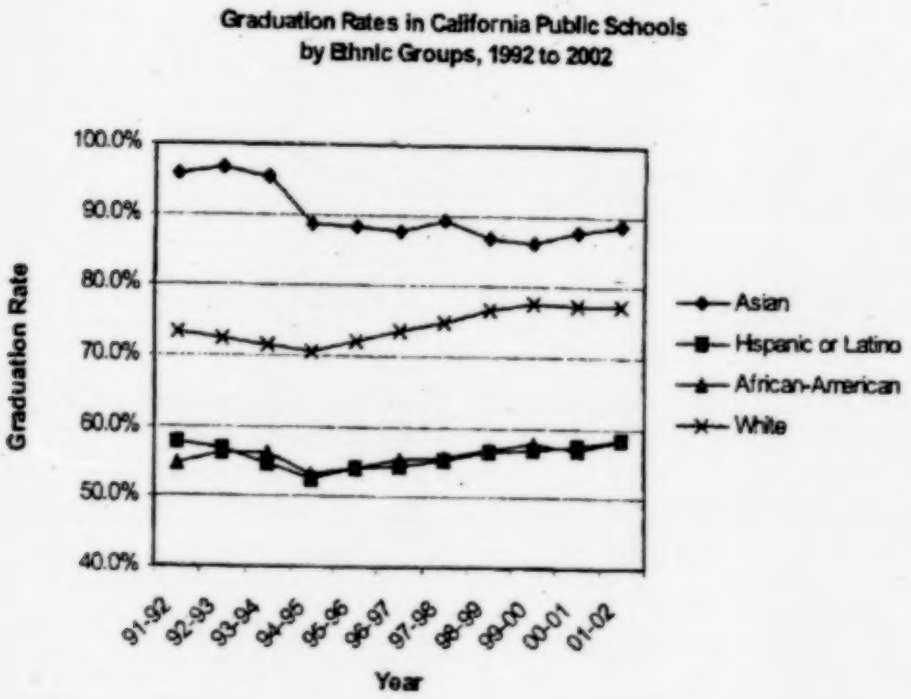

Figure 6. Based on California Department of Education data using basic completion ratio

Ms. Hadley goes on to state that

> [t]he graduation rates of California's minority students were above the national average in 2001. In California, 82.0% of Asian students graduated in 2001, compared to 76.8% of Asian students nationally. Fifty-seven percent of Hispanic students in California graduated in 2001, compared to 53.2% nationally. California's black students beat the

> national graduation rate by 5.1% in 2001, with 55.3% of California's black students graduating from high school.

Hadley, *supra*, at 133. Ms. Hadley concludes that "California's minority students are obtaining their high school diplomas at a greater rate than minority students nationally." Hadley, *supra*.

Improvements also are evident in the dropout rate for California's high school students for both minority and non-minority students. For example, between 2002-2003 and 2004-2005, the average drop rate for minorities decreased by1.32% and the overall average dropout rate decreased by 1.89%. Education Data Partnership, High School Accountability - State of California, http://www.ed-data.k12.ca.us/Navigation/fsTwoPanel.asp?bottom=%2Fprofile%2Easp%3Flevel%3D04%26%20reportNumber%3D16 (last visited July 14, 2006). Since the adoption of Proposition 209, more students are graduating from high school, the drop out rate has improved, and more students are taking classes for admission to the University of California and state universities. *Id.*

The constitutional answer to helping disadvantaged persons is equal educational opportunities for all. It is the responsibility of elected local school boards to ensure that every child has a genuine opportunity to receive a serious education no matter what school he or she attends.

CONCLUSION

There is more than a touch of irony in this case. By discounting the core concept of equal protection, public schools are sending the wrong message to our children—that racial discrimination is more important than individual rights and liberties in today's society. As the Fourth Circuit Court of Appeals said:

> We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.

Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999). The central question before this Court is whether the federal constitution permits this result. Amici respectfully suggest that this Court should adopt a bright line rule that race should play no role in assigning students to noncompetitive, compulsory K-12 public schools, that *Grutter* is limited to its facts, and overturn the decision below.

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Respectfully submitted,

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